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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 DEAN BEAVER, et al.,  
11 Plaintiffs,

12 vs.  
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14 TARSADIA HOTELS, et al.,  
15 Defendants,

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TARSADIA HOTELS, et al.,  
18 Third Party Plaintiffs

19 GREENBERG TRAURIG, LLP, et al.,  
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Third Party Defendants

CASE NO. 11CV1842-GPC(KSC)

**ORDER DENYING THIRD PARTY  
DEFENDANT'S MOTION TO  
DISMISS, AND ALTERNATIVELY,  
MOTION TO STAY**

[Dkt. No. 124.]

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23 On June 14, 2013, Third Party Plaintiffs Tarsadia Hotels; Tushar Patel; B.U.  
24 Patel; Gregory Casserly; 5th Rock, LLC; MKP One, LLC; and Gaslamp Holdings, LLC  
25 (collectively "Tarsadia Defendants") filed a third party complaint for professional  
26 negligence; breach of contract and breach of fiduciary duty against their attorney law  
27 firm, Third Party Defendant Greenberg Traurig, LLP ("Greenberg"); and Richard  
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1 Davis.<sup>1</sup> Before the Court is Third Party Defendant Greenberg’s motion to dismiss, or  
 2 in the alternative, stay the third party complaint. (Dkt. No. 124.) Third Party Plaintiffs  
 3 filed an opposition on October 18, 2013. (Dkt. No. 129.) Third Party Defendant filed  
 4 a reply on October 31, 2013. (Dkt. No. 132.) After a review of the briefs, supporting  
 5 documentation and the applicable law, the Court DENIES Third Party Defendant’s  
 6 motion to dismiss, and DENIES Third Party Defendant’s motion to stay the action.

### 7 **Background**

8 On March 26, 2004, Tarsadia Hotels and 5th Rock’s predecessor PBP Hotel  
 9 Corporation entered into a professional services agreement or engagement agreement  
 10 with Greenberg Traurig, LLP relating to the development, structuring, marketing and  
 11 sale of condominium units at the Hard Rock Hotel and Condominium Project, a mixed-  
 12 use development to include 420 guestroom commercial condominium units (“Units”)   
 13 located at 205 Fifth Avenue in San Diego, California. (Dkt. No. 106-2, Third Party  
 14 Compl. (“TAC”) ¶¶ 17, 18, 19; Ex. A.) All legal services were provided to 5th Rock  
 15 and all other Third Party Plaintiffs. (Id. ¶ 18.) Due to their inexperience with  
 16 condo-hotels, Tarsadia Defendants wanted to ensure that the sales and development,  
 17 structuring, marketing and sales of the units complied with all applicable laws and  
 18 regulations and sought expertise and retained Greenberg. (Id. ¶ 21.) Greenberg was  
 19 retained to advise in the development, structuring, marketing and sale of the condo-  
 20 hotel units and to prepare all documents related to the legal transfer of units to the  
 21 owners. (Id.) Greenberg represented that it was an expert in real estate development  
 22 and specifically with condominiums and condo-hotels. (Id. ¶¶ 22-22.)

23 The March 26, 2004 engagement letter stated that the scope of the work would  
 24 include the “design, implementation and regulatory compliance of a mixed use hotel  
 25 project known as the Hard Rock Gaslamp.” (Id. ¶ 28.) A separate description of  
 26 Greenberg’s scope of work was provided on March 11, 2006. (Id. ¶ 29; Ex. B.) These  
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28 <sup>1</sup>A notice of voluntary dismissal was filed by Third Party Plaintiffs as to Richard  
 Davis on July 26, 2013. (Dkt. No. 117.)

1 included review of existing plans and objectives; design and creation of subdivision  
2 and condominium program and documents; regulatory compliance review; and sales  
3 registrations. (Id. ¶ 29.) Greenberg drafted all legal documents related to the  
4 development, structuring, marketing and sales process. These included the Purchase  
5 and Sale Contract and Addendum (“Purchase Contract”), the Unit Management  
6 Agreement (“UMA”), the Rental Management Agreement (“RMA”), and the governing  
7 documents of the management of the Hotel and owners’ associations and it prepared  
8 and filed the necessary documents with the California Department of Real Estate. (Id.  
9 ¶ 30.)

10 Greenberg specifically advised Tarsadia Defendants that the Interstate Land  
11 Sales Full Disclosure Act (“ILSA”) did not apply because the project would be  
12 completed within two year and qualified for the Improved Lot Exemption under ILSA,  
13 15 U.S.C. § 1702(a)(2). (Id. ¶ 31.) Greenberg assured Tarsadia Defendants that the  
14 documents drafted by Greenberg would comply in all respects with all state and federal  
15 requirements. (Id. ¶ 33.) Greenberg never disclosed sufficient information to allow  
16 them to have any input into the decision not to include a 20-day opportunity for a buyer  
17 to remedy a default or breach of contract, not to include a two-year rescission right or  
18 that should ILSA be found to apply, a buyer may be afforded an absolute two-year right  
19 to rescind his purchase agreement from the date he signed it. (Id. ¶ 34.) Greenberg  
20 also advised Tarsadia Defendants that they did not need to register with or submit a  
21 property report to HUD because ILSA did not apply to the Project since it complied  
22 with the Improved Lot Exemption under ILSA. (Id.)

23 Tarsadia Defendants also sought Greenberg’s counsel on whether to structure  
24 the sale as a sale of real estate, requiring DRE approval, or a security, requiring  
25 registration with the Securities and Exchange Commission (“SEC”) and the California  
26 Department of Corporations (“DOC”). (Id. ¶ 36.) Greenberg specifically told Tarsadia  
27 Defendants that the sale of units would not be deemed a security under applicable state  
28 and federal law and provided an opinion letter. (Id.) Tarsadia Defendants contend that

1 Greenberg failed to advise them that there was any risk that buyers would later argue  
2 that the sale of units was in fact a security and the Purchase Contract was an investment  
3 contract. (Id. ¶ 39.) As a result, five lawsuits have been filed against Tarsadia  
4 Defendants.

5 On May 18, 2011, Plaintiffs Dean Beaver, Laurie Beaver, Steven Adelman,  
6 Abram Aghaehi, Dinesh Gauba, Kevin Kenna and Veronica Kenna initiated a  
7 purported class action against Tarsadia Defendants stemming from their acquisition of  
8 hotel-condo units at the Property. (Id. ¶ 40.) Since then, Tarsadia Defendants have had  
9 to defend the litigation brought by these plaintiffs at considerable cost and have been  
10 subject to negative publicity and a damaged reputation. (Id. ¶ 49.) The purported class  
11 action has also had a detrimental effect on the relationship between Tarsadia  
12 Defendants and the owners of the units, with many of the owners filing litigation  
13 alleging that the sale of condo-hotel units was done fraudulently and unlawfully. (Id.)  
14 Lastly, the claims have negatively impacted the value of the Hotel. (Id.) Further,  
15 Tarsadia Defendants and Greenberg have entered into an agreement tolling any  
16 applicable statutes of limitation. (Id.)

17 On December 8, 2009, Tamer Salameh and others filed a complaint against the  
18 Third Party Plaintiffs in the United States District Court for the Southern District in a  
19 matter entitled Tamer Salameh, et al v Tarsadia Hotel, et al., (Case No. 28  
20 3:09cv-02739-DMS-CAB) (“Salameh Action”). (Id. ¶ 50.) The plaintiffs alleged that  
21 the Purchase Contract, coupled with the UMA and RMA, constitute an investment  
22 contract, and the sale of the Units should have been registered as a security. (Id. ¶ 51.)

23 On April 26, 2010, Royal Alliance filed a complaint against Tarsadia Defendants  
24 asserting a class action on behalf of parties that entered into Purchase Contracts for  
25 condo-hotel units but failed to close, in San Diego County Superior Court in a matter  
26 entitled Royalty Alliance, Inc. v. Tarsadia Hotels, et al., (Case No.  
27 37-2010-00090678-CU-SL-CTL) (“Royalty Alliance Action”). (Id. ¶ 54.) The  
28 plaintiffs in the Royalty Alliance Action asserted claims similar to those asserted in the

1 Salameh Action, claiming that the sale of the units constituted a fraudulent sale of  
2 securities under state law. (Id. ¶ 55.) After much expense, the Third Party Plaintiffs  
3 prevailed on a motion for summary judgment on January 4, 2013. (Id. ¶ 56.) The  
4 ruling in that matter is on appeal before the California Court of Appeal and although  
5 the trial court awarded the Tarsadia approximately \$1.2 million in attorneys' fees and  
6 costs as the prevailing party, they have not been able to attempt to collect on the award  
7 due to the pending appeal. (Id.)

8 On July 26, 2010, a large group of owners, including many of the named  
9 Plaintiffs in this action, filed an action in San Diego County Superior Court in a matter  
10 entitled James Bell, et al v. Tarsadia Hotels, et al (Case No. 37-201 0-00096618- 7  
11 CU-BT-CTL) ("Bell Action"). (Id. ¶ 57.) The plaintiffs in the Bell Action also alleged  
12 that the Tarsadia Defendants failed to comply with securities laws when selling the  
13 condo-hotel units. (Id. ¶ 58.) Tarsadia Defendants were again forced to defend their  
14 actions at considerable expense. (Id. ¶ 59.) Only after the Salameh Action was  
15 dismissed by the Court did the plaintiffs in the Bell Action voluntarily dismiss their  
16 claims. (Id.) Though Tarsadia attempted to recover their attorney's fees as the  
17 prevailing party, the Court held that the claims had been brought under an alleged  
18 "investment contract" and that specific wording in the Purchase Contract and the RMA  
19 did not extend to the specific claims set forth in the Bell Action. (Id.)

20 On May 19, 2011, Tamer Salameh and others filed a cross-complaint against the  
21 Tarsadia Defendants in the matter entitled 5th and K Parcel 2 Owners' Association. Inc.  
22 v. Tamer Salameh, et al (Case No. 37-2010-OO094424-CU-21 OR-CTL) ("5th & K  
23 Action"). (Id. ¶ 60.) Like the other claims before the 5th & K Action, third party  
24 plaintiffs in that action alleged that Tarsadia had fraudulently devised the sales program  
25 for the condo-hotel units, omitting material facts in the Purchase Contract, RMA and  
26 UMA. (Id. ¶ 61.) They further alleged that by omitting material facts, the Third Party  
27 Plaintiffs were able to avoid scrutiny by the DRE regulators. (Id.) The scope and  
28 nature of the claims asserted against the Third Party Plaintiffs in the 5th and K Action

1 continue to evolve to include other aspects of the manner in which the development  
 2 was structured by the Third Party Defendants. (Id. ¶ 62.) Recently, the case was  
 3 certified as a class action and requires that Tarsadia Defendant defend themselves at  
 4 great expense. (Id.)

5 Tarsadia Defendants allege causes of action for professional negligence; breach  
 6 of contract; and breach of fiduciary duty against Greenberg.

7 **A. Legal Standard on Federal Rule of Civil Procedure 12(b)(6)**

8 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state  
 9 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Dismissal under  
 10 Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or  
 11 sufficient facts to support a cognizable legal theory. See Balistreri v. Pacifica Police  
 12 Dep’t., 901 F.2d 696, 699 (9th Cir. 1990). Under Federal Rule of Civil Procedure  
 13 8(a)(2), the plaintiff is required only to set forth a “short and plain statement of the  
 14 claim showing that the pleader is entitled to relief,” and “give the defendant fair notice  
 15 of what the . . . claim is and the grounds upon which it rests.” Bell Atlantic Corp. v.  
 16 Twombly, 550 U.S. 544, 555 (2007).

17 A complaint may survive a motion to dismiss only if, taking all well-pleaded  
 18 factual allegations as true, it contains enough facts to “state a claim to relief that is  
 19 plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly,  
 20 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual  
 21 content that allows the court to draw the reasonable inference that the defendant is  
 22 liable for the misconduct alleged.” Id. “Threadbare recitals of the elements of a cause  
 23 of action, supported by mere conclusory statements, do not suffice.” Id. “In sum, for  
 24 a complaint to survive a motion to dismiss, the non-conclusory factual content, and  
 25 reasonable inferences from that content, must be plausibly suggestive of a claim  
 26 entitling the plaintiff to relief.” Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir.  
 27 2009) (quotations omitted). In reviewing a Rule 12(b)(6) motion, the Court accepts as  
 28 true all facts alleged in the complaint, and draws all reasonable inferences in favor of

1 the plaintiff. al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009).

2 In ruling on a motion to dismiss pursuant to Rule 12(b)(6), a Court may consider  
3 exhibits attached to the complaint, matters subject to judicial notice, or documents  
4 necessarily relied on by the complaint whose authenticity no party questions. See  
5 Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007); Lee v. City of Los Angeles,  
6 250 F.3d 668, 688–689 (9th Cir. 2001); United States v. Ritchie, 342 F.3d 903, 908  
7 (9th Cir. 2003) (“A court may, however, consider certain materials-documents attached  
8 to the complaint, documents incorporated by reference in the complaint, or matters of  
9 judicial notice-without converting the motion to dismiss into a motion for summary  
10 judgment.”).

11 Greenberg argues that the third party complaint (“TPC”) is time barred as a  
12 matter of law. Alternatively, if the TPC is not time barred, then it seeks to stay the  
13 action pending resolution of the main action.

#### 14 **B. Statute of Limitations**

15 Third Party Defendant argues that the third party complaint is barred by the one  
16 year statute of limitations pursuant to California Code of Civil Procedure section 340.6.  
17 It contends that Tarsadia Defendants incurred an actual injury in December 2009, when  
18 the first action, the Salameh Action, was filed. Therefore, the statute of limitations  
19 expired in December 2010 and bars this action. Third Party Plaintiffs oppose arguing  
20 that they did not sustain any actual injury until they paid attorney’s fees to defend each  
21 litigation matter asserted against them. Moreover, they argue that the malpractice  
22 allegations arise not only from the filing of the litigation but also from Greenberg’s  
23 failure to properly advise Tarsadia Defendants as to the risks involved in the project  
24 concerning the relevant federal and state laws, and drafting errors in the documents  
25 prepared by Greenberg.

26 California Code of Civil Procedure section 340.6 provides:

27 (a) An action against an attorney for a wrongful act or omission, other  
28 than for actual fraud, arising in the performance of professional  
services shall be commenced within one year after the plaintiff  
discovers, or through the use of reasonable diligence should have



1 discovered, the facts constituting the wrongful act or omission, or four  
 2 years from the date of the wrongful act or omission, whichever occurs  
 3 first. . . . in no event shall the time for commencement of legal action  
 4 exceed four years except that the period shall be tolled during the time  
 5 that any of the following exist:

6 (1) The plaintiff has not sustained actual injury.

7 Cal. Civ. Proc. Code § 340.6(a)(1). In Jordache, the California Supreme Court stated  
 8 that “[a]ctual injury occurs when the client suffers any loss or injury legally cognizable  
 9 as damages in a legal malpractice action based on the asserted errors or omissions.”  
 10 Jordache Enters. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 743 (1998). “The  
 11 mere breach of a professional duty, causing only nominal damages, speculative harm,  
 12 or the threat of future harm-not yet realized-does not suffice to create a cause of action  
 13 for negligence.” Id. at 750. The client must suffer “appreciable and actual harm”  
 14 emanating from the attorney’s negligence. Id. The court further explained that:

15 [a]ctual injury refers only to the legally cognizable damage necessary  
 16 to assert the cause of action. There is no requirement that an  
 17 adjudication or settlement must first confirm a causal nexus between  
 18 the attorney’s error and the asserted injury. The determination of  
 19 actual injury requires only a factual analysis of the claimed error and  
 20 its consequences. The inquiry necessarily is more qualitative than  
 21 quantitative because the fact of damages, rather the amount, is the  
 22 critical factor.

23 Id. at 752 (citations omitted). The court further clarified that “the existence of  
 24 appreciable actual injury does not depend on the plaintiff’s ability to attribute a  
 25 quantifiable sum of money to consequential damages,” but rather that “actual injury  
 26 may consist of impairment or diminution, as well as the total loss or extinction, of a  
 27 right or remedy.” Id. at 750.

28 Actionable harm “may occur at any one of several points in time subsequent to  
 an attorney’s negligence” and therefore, the determination is generally a question of  
 fact. Adams v. Paul, 11 Cal. 4th 583, 588 (1995). “Actual injury issues require  
 examination of the particular facts of each case in light of the alleged wrongful act or  
 omission.” Jordache, 18 Cal. 4th at 761 n. 9. However, where the facts are undisputed,  
 “the trial court can resolve the question as a matter of law in accordance with the



1 general principles governing summary judgment.” Adams, 11 Cal. 4th at 591.

2 Greenberg argues that the statute of limitations began to run on December 8,  
3 2009 when the first lawsuit was filed against Tarsadia Defendants and expired on  
4 December 8, 2010. It contends that at that point, Tarsadia Defendants hired outside  
5 counsel to defend against those allegations and incurred attorneys’ fees. Tarsadia  
6 Defendants argue that they did not sustain any injuries until they paid the attorney’s  
7 fees to defend each litigation matter asserted against them.

8 While Tarsadia Defendants became aware of the alleged negligence of  
9 Greenberg when the first lawsuit was filed, it is not clear whether they incurred  
10 “appreciable and actual harm” at that time.<sup>2</sup> Moreover, the fact that five lawsuits were  
11 filed complicates the issue and will require an examination of the particular facts to  
12 determine when Tarsadia Defendants suffered “actual injury.” The Court concludes  
13 that the determination of when Tarsadia Defendants sustained “actual injury” is a  
14 question of fact and may have occurred at any one of several points in time subsequent  
15 to Greenberg’s alleged negligence. See Adams, 11 Cal. 4th at 588. Therefore, the  
16 Court DENIES Greenberg’s motion to dismiss the TPC on the basis of the statute of  
17 limitations.<sup>3</sup>

### 18 **C. Securities Related Claims**

19 Greenberg argues that even if the claims are not time barred, the securities  
20 related claims fail as a matter of law because the Ninth Circuit recently affirmed the  
21 district court’s order granting Defendant’s motion to dismiss in the Salameh case which  
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25 <sup>2</sup>In Jordache, the Court held that the actual injury sustained occurred when the  
26 subsequent litigation was filed because the client had already lost millions of dollars  
27 in unpaid insurance benefits for defense costs and in lost profits from diversion of  
investment funds to pay the defense costs. Jordache, 18 Cal. 4th at 752.

28 <sup>3</sup>The parties also discuss the tolling agreement between the parties. The Court  
need not address the tolling agreement as it denies Greenberg’s motion to dismiss due  
to the factual nature of the “actual injury” inquiry.

1 confirms that Greenberg's advice was correct.<sup>4</sup> Tarsadia Defendants contend that the  
2 Salameh decision does not conclusively establish that Greenberg is not liable for  
3 malpractice.

4 A legal malpractice cause of actions requires the plaintiff to show "(1) the duty  
5 of the professional to use such skill, prudence, and diligence as other members of his  
6 profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate  
7 causal connection between the negligent conduct and the resulting injury; and (4)  
8 actual loss or damage resulting from the professional's negligence." Thomas v. Lusk,  
9 27 Cal. App. 4th 1709, 1716 (1994). A favorable ruling by the Ninth Circuit does not  
10 relieve Greenberg of its alleged failure to provide competent representation. See  
11 Jordache, 18 Cal. 4th at 753 ("Although the outcome of the coverage litigation may  
12 have reduced Jordache's damages, that action could neither necessarily exonerate  
13 Brobeck, nor extinguish Jordache's action against Brobeck for failure to render timely  
14 advice on insurance issues."). Similarly here, while a favorable ruling by the Ninth  
15 Circuit may relieve Tarsadia Defendants from damages, the case does not exonerate  
16 Greenberg from an allegation that it did not provide adequate legal advice on these  
17 issues.

18 In the TPC, Tarsadia alleges that Greenberg breached the duty of care and has  
19 failed to exercise the reasonable care, skill, diligence, and fidelity to clients required  
20 of attorneys by (i) concluding that the sale of the units was not a security that required  
21 registration without disclosing to Tarsadia that there was any risk that a purchaser  
22 would so allege; (ii) concluding that the Purchase Contract coupled with the RMA was  
23 not a common enterprise without disclosing to Tarsadia that there was any risk that a  
24 purchaser would so allege; (iii) failing to properly draft sales documentation, including  
25 the Purchase Contract, the RMA and the UMA to avoid any claim that the sale of the  
26 units would later be alleged to be a security; and (iv) failing to adequately advise the

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28 <sup>4</sup>In its reply, Tarsadia Defendants raise the issue of judgmental immunity  
doctrine; however, the Court notes that Greenberg does not assert judgmental immunity  
argument in its moving papers.

1 Tarsadia of the consequences of marketing the Hotel in such a manner that could  
 2 potentially be accused of being in violation of federal and state securities laws. (Dkt.  
 3 No. 106-2, TPC ¶ 72.) These issues have nothing to do with the outcome of the  
 4 Salameh case.

5 Greenberg also argues that the engagement letter<sup>5</sup> signed by both parties  
 6 expressly disclaimed any promise or guarantee with respect to the outcome of the Hard  
 7 Rock Project. Tarsadia Defendants contend that an engagement letter cannot exculpate  
 8 Greenberg from liability as to attorney malpractice.

9 While an attorney may not limit the attorney's liability to the client for legal  
 10 malpractice, it can limit the scope of the representation. Nichols v. Keller, 15 Cal. App.  
 11 4th 1672, 1684 (1993). While the engagement letter expressly disclaimed any promise  
 12 or guarantee with respect to the outcome of the Hard Rock, it did not relieve itself from  
 13 liability based on attorney malpractice. Accordingly, Greenberg's argument is without  
 14 merit and the Court DENIES Greenberg's motion to dismiss the securities related  
 15 claims.

#### 16 **D. Request to Stay the Action Pending Outcome of the Main Action**

17 Greenberg requests that the Court stay the proceedings on the TPC until the  
 18 outcome of the main action contending that the Court will need to delay the trial in the  
 19 main case as Greenberg will be required to reopen discovery and file dispositive  
 20 motions. Tarsadia Defendants oppose a stay arguing that it would create redundant  
 21 litigation and possibly inconsistent results since Greenberg would not be bound by any  
 22 judgment in this action. Exercising its inherent authority, the Court DENIES  
 23 Greenberg's request for a stay.

#### 24 **Conclusion**

25 Based on the above, the Court DENIES Third Party Defendant Greenberg's


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26  
 27 <sup>5</sup>“7. No Guarantee of Results. We have not made and shall not make any  
 28 promises or guarantees to you concerning the outcome of your success in the  
 Transaction and you acknowledge that nothing previously communicated to you or  
 contained in this engagement letter shall be construed as such a promise or guarantee.”  
 (Dkt. No. 106-3, TPC, Ex. A.)

1 motion to dismiss, and alternatively, DENIES its motion to stay the proceedings.

2 IT IS SO ORDERED.

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4 DATED: December 17, 2013

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6 HON. GONZALO P. CURIEL  
7 United States District Judge  
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